UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORECIVIC OF TENNESSEE, LLC,
Employer,

Case No. 28-RC-213154

v.

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA),
Petitioner
/

Brief Supporting Petitioner's Motion Opposing Employer's Request for Review

Petitioner submits this brief supporting its motion opposing Employer's Request for Review.[1] For the reasons stated here, without limitation, none of the four grounds for review enumerated in Rule No. 102.67(d) are present here.

The Board should therefore not grant Employer's Request for Review and should instead issue an Order Certifying Petitioner as the collective bargaining representative in the above-captioned case.

I. Inman was not "At or Near the Polls"

As a threshold matter, the Board should reject Employer's *ipse dixit* assertion throughout its brief that Inman was 30 feet from the polling area and therfore "at or near the polls."

The Hearing Officer's recommended finding, contrary to Employer, was that Inman was fifty (50) feet from the polling area. To do so, she credited the testimony of a witness with five years of service at the facility over other witnesses who do not actually work there. Report at 5-6. The credited witness, moreover, was produced by Employer.

Given the above, it was not clearly erroneous for the Regional Director to adopt the recommend finding. Decision at 2. This is especially true considering that, as noted by the Regional Director:

> [I]t is the Board's established policy that a Hearing Officer's credibility findings … should only be reversed when the clear preponderance of all the relevant evidence convinces the Board that the Hearing Officer's resolution is incorrect.

Id. fn. 2; *Trs. of Columbia Univ. in N.Y. & Graduate Workers of Columbia-GWU*, 2017 NLRB LEXIS 620 (2017) *citing Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957).

[1] This brief includes by reference Petitioner's Motion Opposing exceptions, the Hearing Officer's Report and Regional Director's Decision Certifying Unit.

For these reasons, the Regional Director's finding that Inman was 50 feet from the polling area controls here.

II. The Regional Director Correctly Concluded that Petitioner did not Electioneer in Restricted Areas

Employer in its brief implicitly acknowledges that the facts of electioneering decisions *Brinks* and *Star Expansion* do not reach this case, stating "*Brinks* and *Star Expansion* themselves establish that there is no 'one size fits all' method for determining whether particular conduct is objectionable. It is axiomatic that objectionable conduct will take a number of different forms." Er. Br. at 14.

Of course, different facts can support objections of comparable coercive effect and there is no one size fits all "method." [2]

Under Employer's alternative "method," however, Employer wants the Board to find that a five-minute conversation at low-volume, 50 feet from the polling area where at most 6 voters briskly passed, during which conversation Inman did not instruct anyone how to vote, is comparable to the coercive effect in *Brinks* and *Star Expansion*.[3]

In *Brinks*, a union agent, from within the voting area and contrary to Board agent instructions, gestured to 6 voters and told 4 of them how to vote, which instruction was later disseminated throughout the petitioned for unit. Petitioner witness Joe Durham testified, in contrast, that there was no dissemination of Inman's conversation. Tr. 78; 19-35.

In *Star Exemption*, for a total of one (1) hour and 15-20 feet from the polling area, a union agent patted voters on the back and instructed them where to mark ballots, all contrary to Board agent instructions.

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[2] Nothing in the Regional Director's decision is contrary. He distinguished *Brinks* by stating: "Inman's conduct does not rise to the level of the observer's conduct in *Brinks*." Decision at 4. This statement undercuts Employer's implicit accusation that the Regional Director adopted a blinkered one size fits all approach. Instead, he recognized that different facts can support objections of the same level of seriousness, but that that possibility did not actualize here.

[3] The Board should discount Employer's assertion that Inman was wearing "Union Insignia." Er. Br. at 13. ***First***, the Hearing Officer found that such insignia was not visible. R. at. 7. This is not contradicted by the "clear preponderance" of record evidence required to disturb such a finding. *see supra* at 1. ***Second***, available video evidence shows that for a substantial amount of the eleven minutes at issue here, Inman had his back turned toward entering voters. The insignia consisted of small lettering on the front of Inman's shirt that would not have been visible while Inman's back was turned. *See also Trs. of Columbia Univ. in N.Y. & Graduate Workers of Columbia-GWU*, 2017 NLRB LEXIS 620 fn. 1 (Chairman Miscimarra, dissenting)(finding lack of objectionable conduct based partly on lack of evidence that agents were *known* and *visible* to voters).

In other words, Inman interacted with fewer employees than the agents in *Brinks* and *Star Expansion*, interacted with employees at a much greater distance from the polling area, and such interactions were less egregious because not contrary to Board agent instructions or feature an instruction to vote for the union.

Given the above, Employer's alternative "method" strains credulity far past its breaking point by requiring that the election be set aside based on superficial similarities with *Brinks* and *Star Expansion*. Sometimes factual differences do not support a different result. Oftentimes, however, they do. The latter is the case here.

Moreover, the putative coercive effect of Inman's conversation is based on metaphysical speculation, since there is no testimony that passerby could hear this conversation. What record evidence there is, in fact, suggests the contrary.

Durham testified without contradiction that he could not hear Inman from the polling area. Tr. 78; 16-18. Available video evidence shows that not a single voter stopped or even slowed his pace to listen to Inman's conversation.

Even if passersby could hear Inman's conversation, they were just as likely to be swayed in Employer's favor. As a threshold matter, Employer mischaracterizes testimony throughout its brief, stating that Inman "disparaged [Employer] in the presence of at least six eligible voters in the area they had to pass to reach the Voting Room." Er. Br. at 15.

There is in fact no testimony that Inman "disparaged" Employer. Most available evidence shows that Inman stated pay rates at other facilities and which facilities were unionized. Tr. 52; 21-25; Tr. 52; 1-3. While Rodriquez did testify that Inman stated that Employer had fired employees for "no reason," that lone comment falls short of "disparagement." Tr. 53; 4-7.

In any event, this comment caused Rodriguez to respond:

> I'm like we don't get fired here for no reason. There is a reason. If you get fired, it's because they have – you didn't follow policy and procedures and they have proof of that, and end of story. I walked away from his conversation.

Tr. 53; 8-11.

Accordingly, depending on when they walked past, each of the passersby could have heard either of Inman's comment that Employer had *sometimes* fired employees for no reason or Rodriguez' comments that *no employee* had *ever* been fired for no reason and that each firing was supported by proof. The latter comments have more coercive effect on an objective employee.

For these reasons, the Regional Director did not depart from established Board precedent or clearly error in deciding factual issues by finding that "Inman's conduct did not rise to the level of the observer's conduct in *Brinks*" and that *Star Enterprises* was "distinguishable." Decision at 4.

More credible but equally unavailing is Employer's assertation that *Katz*, *Performance Measurements* and *Electric Hose* apply.

Employer states "party affiliation is irrelevant to the determination or whether that party engaged in relevant conduct." Er. Br. at 16. Employer cites *Boston Insulated Wire* in support. *Id*.

While it is true that *Boston Insulated Wire* did not expressly state that a party affiliation matters, that issue was not actually taken up in that case. In any event, the agents at issue there were employer agents. Accordingly, by applying *Boston Insulated Wire* to union agents, it is Employer that wants to go beyond its particular facts.

However, *Longwood Sec. Servs*., 364 NLRB No. 50 (2016), handed down after *Boston Insulated Wire*, blocks off this interpretive possibility. There, the Board stated: "[t]he dissent contends that the continuing validity of the Board's application of different standards to like kinds of employer and union conduct during representation elections has been called into question by [Katz] … We disagree." *See also First Student, Inc.*, 355 NLRB 410, 410 (2010); *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362 (6th Cir. 1984).

In addition, as the Regional Director correctly concluded, *Katz* was significantly different procedurally from the instant case and is therefore inapplicable. Decision at 3.

Performance Measurements and *Electric Hose* are likewise inapplicable. Employer agents were located 2 feet and 10-15 feet from the polling area, respectively. Inman was 50 feet from the polling area.

Performance Measurements is particularly inapplicable, both because the offending agent was much closer to the polls and because the offending agent was the employer's president. A president has much more power over and recognition among voters than Inman had over employees at Employer's facility.

For these reasons, without limitation, the Regional Director did not depart from established precedent or prejudicially error in finding a lack of objectionable electioneering.

III. The Regional Director Correctly Found that *Milchem* did not apply.

Employer asserts that the Regional Director's Order "sets a new standard under *Milchem*; [sic] so long as an agent only indirectly communicates with eligible voters, his or her conduct comports with the conditions of a free and fair election." Er. Br. at 4.

Instead, it is Employer that urges a new standard under *Michelm*: one where elections are set aside where there is the unproven possibility that there was indirect communication between an agent and voters.

Milchelm involved *direct* communications a few feet from the polling area between a union agent and at least several interlocutors, with about 15 voters standing in close proximity. Under those circumstances, it can be safely assumed that the 15 voters overheard the conversation. The same

assumption cannot hold in the case of the six (6) voters here. The voters briskly walked past Inman and did not slow their pace and there is no evidence he heard them.

Employer also urges a new standard under *Milchem* by contending that it is irrelevant whether Hume and Rodriguez had already voted by the time they talked with Inman. As a threshold matter, this departs from the particular facts of *Milchem*, because the voters there, unlike here, had not already voted.

In any event, it obviously does matter whether Hume and Rodriguez already voted: if they already voted, Inman's coercive effect on them was irrelevant.

Pastoor Bros. Co., 223 NLRB 451, 451 (1976), cited by Employer, is not contrary. Er. Br. at 23. The Board in *Pastoor* found objectionable an "offer of campaign literature" to an employee who had already voted because "[the offer] was overheard by other employees waiting in line to vote." *Pastoor Bros. Co*., 223 NLRB 451, 451 (1976). As stated above, there is no testimony that employees overheard Inman and available record evidence strongly suggests the contrary.

For these reasons, without limitation, the Regional Director did not depart from established precedent or prejudicially error in his factual determinations with respect to *Michelm* and related decisions.

IV. The Hearing Officer's Conduct did not Result in Prejudicial Error

The Board should likewise decline Employer's invitation to find prejudicial error in the Hearing Officer's refusal to consider objections based on Inman's conduct after 7:00am. Employer has two (2) distinct prejudicial error arguments.

The first is that Employer was prejudiced by the Hearing Officer's refusal to consider its objection that Inman "entered" the voting room "during" polling. This is not so.

The Hearing Officer refused to hear this evidence because the Regional Director's Order Directing Hearing only permitted a hearing as to Petitioner's lone Objection 1. Report at 1. That objection stated that it challenged conduct occurring beginning 6:49 am and ending at 7:00am. *Id.* Accordingly, conduct *after* 7:00am was not encompassed within the scope of the Regional Director's Order. The Hearing Officer therefore did not prejudice Petitioner by considering conduct alleged in Objection 1. She was doing only what the Regional Direct authorized her to do.

Moreover, *Richard A. Glass*, relied upon by Employer in its brief, would not have permitted the Regional Director to have ordered an investigation into conduct after 7:00am.

In *Richard A. Glass*, it had been ordered that an election be held at the high point of a growing season of the Employer, when the number of employees was at its maximum. Ultimately, an election was held among 43 employees. After the election, the season reached its high point and 80 employees worked in the unit. Accordingly, almost half of the unit was denied a vote.

The Board agreed that the date the election was held, though not alleged specifically by the objecting party, could serve as a basis to set aside the election, stating: "the Board's standards for election procedures to insure full and free expression of employee wishes were not met in this case." *Id.* at 916.

Inman's conduct after 7:00am involved a maximum of two votes, with 185 total votes cast. This does not implicate "full and free expression" to at all the same extent as in *Richard A. Glass Company*.

Employer's second "prejudicial error" argument relies on CHM Rule No. 11324. According to Employer, this Rule established that the two voters arriving at the polling area after 7:00am should have "*only* have been permitted to vote subject to challenge." (emphasis in original). Er. Br. at 24.

This should be rejected for several reasons. ***First***, it appears for the very first time in Employer's Request for Review: it appears nowhere in Employer's objections and is not reasonably encompassed by them, let alone in the Regional Director's Order.

Taking up this argument, therefore, would violate Board Rule No. 102.69(a). *See also* CHM 11424.3(b); *Precision Products Group, Inc., 319 NLRB 640* (1995); *Iowa Lamb Corp*., 275 NLRB 185 (1985).

Moreover, this argument was not raised at hearing or in Employer's exceptions. Therefore, Employer gets the prejudice issue exactly backwards: if the Board takes up the second prejudicial error argument, Petitioner will have been deprived utterly of the chance to adduce facts supporting counterarguments.

In addition, "purported noncompliance with [CHM Rule No. 11324] does not warrant setting aside an election, absent a showing that the deviations from the guidelines raised a reasonable doubt as to the fairness and validity of the election." *Patient Care of Pa., Inc.*, 360 NLRB No. 76 (2014). *See also Solvent Servs.*, 313 NLRB 645, 646 (1994); *Superior Indus*., 289 NLRB 834, 837 fn. 13 (1988).

It was not unfair or otherwise invalid for the agent to allow (2) ballots to be cast, because such ballots could not have made a difference in the election outcome: since Petitioner won by a twelve (12) vote margin.

For these reasons, without limitation, the Hearing Officer's conduct during the objections hearing did not result in prejudicial error.

Conclusion

For the above-stated reasons, without limitation, none of the Regional Director's findings are clearly erroneous or depart from established precedent. Specifically, there was no electioneering, *Milchelm* and related decisions were inapplicable, and any objection to the Hearing Officer's conduct fails on both procedural and substantive grounds.

Accordingly, Petitioner respectfully requests that the Board deny Employer's Request for Review and issue an Order Certifying Petitioner as the collective bargaining representative.

Respectfully submitted,

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Certificate of Service

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